COURT OF SESSION.

Wednesday, July 6.

SECOND DIVISION.

(SINGLE BILLS.)

THE OREGON MORTGAGE COMPANY, LIMITED, PETITIONERS.

Company—Reduction of Capital—Alteration of Articles of Association—Resolutions taking Power to Reduce Capital and Reducing Capital Passed at Same Meeting and Confirmed at the Same Subsequent Meeting—Competency—Companies (Consolidation) Act 1908 (8 *Edw. VII, cap.* 69), *secs.* 13 (1), 46 (1).

The Companies (Consolidation) Act 1908 enacts by section 13 (1) that a company may by special resolution alter its articles, and by section 46 (1) that, subject to confirmation by the Court, a company, if so authorised by its articles, may by special resolution reduce its share capital.

A company which under its articles of association had no power to reduce its capital passed at an extraordinary general meeting two resolutions, one of which adopted new articles of association whereby the company was authorised to reduce its capital, and the other provided for the reduction in a certain way. These resolutions were both duly confirmed as special resolutions in terms of the statute at a subsequent extraordinary meeting. *Held* that the procedure was incompetent, in respectt hat at the time the resolution to reduce was adopted there was no power to reduce, such resolution not being competent until the resolution conferring that power had been duly confirmed.

The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69) enacts—Section 13—"(1) Subject to the provisions of this Act and to the conditions contained in its memorandum a company may by special resolution alter or add to its articles. . . ."

Section 46—"(1) Subject to confirmation by the Court, a company limited by shares, if so authorised by its articles, may by special resolution reduce its share capital in any way. . . ."

Section 69—"(1) A resolution shall be an extraordinary resolution when it has been passed by a majority of not less than three-fourths of such members entitled to vote as are present . . . . at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given. (2) A resolution shall be a special resolution when it has been (*a*) passed in manner required for the passing of an extraordinary resolution; and (*b*) confirmed by a majority of such members entitled to vote who are present . . . . at a subsequent general meeting of which notice has been duly given, and held after an interval of not less than fourteen days nor more than one month from the date of the first meeting."

The Oregon Mortgage Company, Limited and Reduced, presented a petition for confirmation of reduction of capital.

Under the original articles of association the company had no power to reduce its capital. At an extraordinary general meeting, duly convened and held on 19th November 1908, certain resolutions were duly passed, and at a subsequent extraordinary general meeting, duly convened and held on 10th December 1908, the same were duly confirmed as special resolutions. The first of these resolutions was as follows, viz.:—"1. That as and from the date of the confirmation of this resolution the articles of association contained in the printed document submitted to the meeting, and for the purpose of identification subscribed by the chairman of the company, be and the same are hereby approved and adopted as the regulations of the company to the exclusion of and in substitution for the existing articles of association thereof." The third resolution provided for the reduction of the company's capital by the cancellation of a certain sum per share.

The articles of association to be substituted for the existing ones under the first resolution contained the following provision:—"9. The company may from time to time reduce its capital in any manner permitted by law, and capital may be paid off on the footing that it may be called up again, or otherwise."

On 15th June 1910 the Court remitted to Mr C. E. Loudon, W.S., to report. In his report Mr Loudon pointed out, that though the company had power to reduce its capital by the new articles of association, it was questionable if it possessed that power at the date of the reduction.

The petitioners moved in the Single Bills that the prayer of the petition be granted, and argued—If the alteration of the articles was effected only when the resolution altering them was confirmed, similarly the capital was reduced only when the resolution reducing it was confirmed, and there was therefore at that time power to reduce under the new articles. If, on the other hand, the reduction was effected at the first meeting, subject to confirmation, the same must be true of the power to reduce, and again there was power to reduce when the resolution reducing was passed.

LORD JUSTICE CLERK—One is always sorry in cases of this kind when procedure which has been gone through is thrown away, but I must say that, having given my best consideration to the matter, I have come to the conclusion that the point which the reporter has brought before us is of a somewhat serious nature. The difficulty is that the procedure taken here is procedure which could not be carried out under the articles of association of this company. Under its articles of association the company had no power to reduce its capital. If the capital was to be reduced, it was necessary, first, that the articles

should be altered so as to increase the powers of the company. That could only be done in one way—by the passing of a resolution at an extraordinary general meeting of the company, and the confirmation of that resolution at a subsequent extraordinary general meeting called for the purpose. Now could any procedure be taken under that resolution until the second meeting was held? I do not think it could, and I think that the illustration which I suggested at the discussion tests the matter very well. Suppose that at the first meeting, when the resolution to reduce capital was put to the meeting, a shareholder had objected that it was incompetent because the resolution altering the articles of association had not been confirmed and therefore the power did not exist, would there be any answer to his objection? I can see none, and under these circumstances I am afraid that the changes which this company desires to carry out must be obtained by more regular procedure than has been taken as disclosed in the report.

LORD ARDWALL — I am of the same opinion. I was at first disposed to pass from the objection taken by the reporter on the grounds ingeniously suggested by Mr Watson. But on considering the question in view of the terms of the Companies Act, I have come to the same conclusion as your Lordship as to the inadvisability of confirming the reduction of capital alleged to have been authorised by the third resolution mentioned in the petition. I do not think it would be safe to sanction a practice which is not in strict accordance with the Companies Acts, as that might prove a very dangerous precedent in other cases.

LORD DUNDAS concurred.

LORD LOW was absent.

The Court continued the petition.

Counsel for the Petitioners—Hon. W. Watson. Agents—Auld & Macdonald, W.S.

Friday, July 8.

SECOND DIVISION.

SPRING *v.* MILNES (MARTIN'S TRUSTEES) AND OTHERS.

Process—Jury Trial—Reduction of Will—Issues of Incapacity and of Facility and Circumvention—Verdict for Pursuer on both Issues—Inconsistency—Application for New Trial.

In a reduction of a will two issues were sent to a jury, namely—(1) whether the will was not the deed of the deceased; and (2) whether the deceased was weak and facile and easily imposed upon, and whether the defender did by fraud or circumvention impetrate the will from the deceased, to his lesion. The jury found for the pursuer on both issues. On a motion for a new trial, the Court, being of opinion that there was evidence to support the verdict on the first issue, but no evidence to support it on the second, *held* that the verdict was inconsistent and must be set aside, and *granted* a new trial.

Robert Spring raised an action against James Milne and George Milne and others concluding for reduction of a trust-disposition and settlement, bearing to have been executed by the late William Martin on 24th November 1896, and a codicil thereto bearing to have been executed by him on 18th January 1897, under which settlement and codicil the defenders James Martin and George Martin were trustees and the other defenders beneficiaries.

The case was sent to trial on the following issues:—"1. Whether the pretended trust-disposition and settlement, dated 24th November 1896, and the pretended codicil dated 18th January 1897, are not the deeds of the late William Martin? 2. Whether on or about 24th November 1896 and 18th January 1897 the late William Martin was weak and facile in mind and easily imposed upon, and whether the defenders, Mrs Agnes Martin or Milne and James Milne, or one or other, and which of them, taking advantage of the said William Martin's weakness and facility, did by fraud or circumvention impetrate from him the said trust-disposition and settlement and the said codicil,—to the lesion of the said William Martin?"

The case was tried before Lord Ardwall and a jury on 23rd, 24th, 25th, 26th, 27th, and 30th November 1909.

The jury found "by a majority for the pursuer on both issues."

The defenders moved for a rule on the pursuer to show cause why a new trial should not be granted, on the grounds that the verdict was (1) inconsistent, and (2) contrary to evidence.

The motion having been granted, the pursuer argued at the hearing:—The verdict could not be set aside on the ground of the alleged inconsistency—*Morrison* v. *M'Lean's Trustees*, February 27, 1862, 24 D. 625; *Scott's Trustees* v. *Bannerman*, January 12, 1848, 10 D. 353; *Scrimgeour* v. *Ker*, December 13, 1836, 15 S. 245. A verdict on the first issue did not require that the deceased be insane, but merely incapable of granting the particular deed. It might well be that the deceased was destitute of the requisite capacity to make the particular deed in question and at the same time that the defenders were guilty of fraud or circumvention. If there was such conduct on the part of the defenders as would warrant a verdict on the second issue, and if the deceased's state of mind was such as was required for a verdict on the first issue, then the fraud or circumvention on the part of the defenders was all the more palpable—*per* Lord Gillies in *Scrimgeour* v. *Ker*, *cit.* It might be true that in that case, as another report in 12 8vo. Fac. Coll. 229 seemed to suggest, the defender admitted that he could not impugn